No. 02-371

APR 4 2003

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

COMMONWEALTH OF VIRGINIA,

Petitioner,

—v.—

KEVIN LAMONT HICKS,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF VIRGINIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia is one of its state affiliates. Since its founding in 1920, the ACLU has vigorously defended the concept that public streets should be open to the public, and has articulated that position in numerous cases before this Court, including the seminal case of *Hague v. CIO*, 307 U.S. 496 (1939).

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members and 28,000 affiliate members nationwide. Among the NACDL's objectives are to promote the proper and fair administration of justice and to ensure due process for persons accused of crime." To those ends, NACDL has appeared as amicus curiae in this Court on numerous occasions.

STATEMENT OF THE CASE

Whitcomb Court is a residential neighborhood in Richmond, Virginia comprised of multiple low rise apartment buildings that are neatly laid out on the city grid, with streets and traditional curb and gutter sidewalks. Until recently these were city owned streets. Title has since been transferred to the Richmond Redevelopment and Housing Authority (RRHA), which owns the apartments on the property directly adjacent to the streets. The City continues

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

to maintain and patrol the streets. The RRHA has adopted a policy prohibiting the use of the streets by non-residents, their guests, or others who cannot establish a *legitimate reason* for being there. Enforcement is left completely to the discretion of the local police without any requirement that they act on a complaint lodged by RRHA officials.[2]

The streets that run in and around Whitcomb Court are indistinguishable in form and function from the streets throughout Richmond and in thousands of subdivisions across the United States. Whitcomb Court is a neighborhood like any other and is fully incorporated into the broader residential community that surrounds it. There is an elementary school and playground directly west of the neighborhood and on public property that abuts one of the streets that has been transferred to RRHA (the 2100-2300 block of Sussex street). *See* map lodged with the Court by Respondent.[3] The neighborhood is not some isolated dead-end terminus lying at the outskirts of the city. There are no gates or checkpoints and the streets either intersect with or flow directly and seamlessly into other city streets. Even more so than a cul-de-sac or other residential subdivision that is commonly accessed by a single road, entry to the neighborhood here is as easy as stepping off the sidewalk at any point or driving through one of several streets that flow into other city streets. Under these circumstances,

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[2] Unless otherwise indicated, the facts cited herein are reported in the opinions below.

[3] *See* website for Richmond city schools. http://www.Richmond.112.va.us/schools/rpsredisign/es/Whitcomb/webpage1.html. Additionally, Whitcomb Court Recreation Center, located at 2302 Carmine Street (another "privatized" street), serves as the polling place for Richmond residents in the Sixth District, which includes voters who do not live in Whitcomb Court. http://www.sbe.state.va.us.VotRegServ/Polling_Place/PollingPlacecounty-city.asp>. In addition, a local Boys and Girls Club is located at the Whitcomb Court Recreation Center. *See* <http://www. Bgcmr.org/htl.joinclub/ joinclub_location.htm>.

enforcement of the "no trespass" policy is neither practical nor susceptible to evenhanded application.

People who live or visit the community continue to use the streets and sidewalks as a conduit in their daily affairs and as a place to meet and greet friends and neighbors. Vehicle and pedestrian traffic continues to flow through the neighborhood largely unfettered. Garbage is picked up by City service vehicles, school buses travel through, mail is delivered, the streets are patrolled by the City police, and the City continues to be responsible for the maintenance of the streets. Even First Amendment activity is routinely permitted according to the testimony of the Housing Director. J.A. 37-38. All these attributes perfectly define the quintessential public forum. The only thing that has changed is that people who are targeted for exclusion are now subject to arrest for the very same conduct that was previously beyond the reach of the law.

Concerned with the problems of inner-city blight that plague low income neighborhoods in every major city, Richmond and RRHA officials devised a plan to clean-up the streets in and around Whitcomb Court by targeting "drug dealers" and other people who threaten the safety of the community. The City would simply abandon all or part of the several streets that anchor the Whitcomb Court neighborhood. To accomplish this, the City adopted a resolution purportedly closing the streets and conveyed title to the RRHA. This was done with the full understanding that the streets would continue to function and be maintained as public streets for the use and enjoyment of the residents of that community, including their guests, as well as others who have a "legitimate" reason to be there. To ensure that the streets continued to function as they historically did, the City retained responsibility for maintenance of the streets and policing of the streets. The City also reserved a full-width utility easement for the placement of utility poles, sewage

lines and other utility services. These interests are all consistent with the city's ownership of the streets throughout Richmond.

After title to the streets was conveyed, the Housing Authority posted 'No Trespassing' signs and adopted a policy prohibiting "any unauthorized person from entering the property." The policy authorizes the Richmond Police to enforce the trespass laws of the state upon the property of Whitcomb Court. "[E]ach and every Richmond Police Department officer [is authorized] to serve notice, either orally or in writing , to any person [found on RRHA property] when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises." Pet. App. 31. A printed brochure issued by RRHA to the Whitcomb Court residents similarly explains that the "no trespass" policy applies to all non-residents who cannot demonstrate that they are on the premises "visiting a lawfully residing resident, or on the development conducting legitimate business." *Id.*

The initial decision to bar someone from the streets of Whitcomb Court can be made either by the police or housing officials; in practice, it is more often the former than the latter. There is no clear procedure for contesting the decision, which can be delivered orally or in writing. There are also no written policy guidelines that define more precisely the circumstances under which a person can be barred. Most significantly, a person who has been barred and returns is subject to arrest for trespass even if there is a "legitimate" purpose for this second visit. Once barred, for example, a person can no longer visit immediate family members who live in Whitcomb Court (or any other public housing development in Richmond) without risking arrest. Pet. App. 32. The housing director testified that she is unaware of anyone ever being removed from the barred list. J.A. 35.

The respondent, Kevin Lamont Hicks, does not live in Whitcomb Court. His mother, his baby, and his baby's mother all do. Hicks had been previously barred from the property and twice previously convicted of trespass. His requests to visit his children have been denied by RRHA officials. There is nothing in the record that explains either his barment or his previous convictions.[4] In fact, RRHA officials have taken the position that Hicks can be barred for any and no reason. J.A. 13. His most recent arrest for trespass arose when he was observed walking along one of the streets of Whitcomb Court by an officer who recognized Hicks and knew that he had been barred from the property. The record indicates that he was on the property "bringing Pampers to his baby." The record also indicates that he has twice appealed to Housing Officials to allow him entry to Whitcomb Court in order to visit his family. Pet. App. 32.

Hicks moved to dismiss the case against him on several grounds -- including his right to move freely on the public streets and to visit with his children and his mother. The motion was denied and Hicks was convicted. His conviction was affirmed by the state intermediate court, and then reversed by an *en banc* court of appeals, which held that the streets in and around Whitcomb Court are indistinguishable from a traditional public forum and that the transfer of title from the City to RRHA was not sufficient to strip them of that status. Pet. App. 37-38. Specifically, the appeals court found that the streets continued to operate like other streets in Richmond and that the transfer of title had not fundamentally altered their form or function. *Id.*[5] Based

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[4] Hicks also has a conviction for destruction of property in Whitcomb Court,. However, it is uncontested that his barment was not related to that charge. Pet. App. 32.

[5] That conclusion is reinforced by the more fully developed record in another state case involving the same challenged policy. In contrast to this case, the trial court in *Commonwealth v.Green*, No. 00M-2225 (Cir. Ct. Richmond, 2000), heard four days of testimony concerning the

implementation and enforcement of the No Trespass policy by RRHA and the Richmond Police Department (RPD). The picture that emerges from that record is completely at odds with the description of how the streets function at Whitcomb Court that is being advanced by the Commonwealth in this case. The evidence in *Green* also shows that there is pervasive confusion over how the policy is implemented and enforced and, more importantly, how the police have been given unfettered discretion to enforce the policy as they see fit.

The most important testimony was from Tyrone Curtis, Executive Director of RRHA and the person in charge of housing management and policymaking at RRHA. He testified that the streets and sidewalks, despite the transfer of title, remain generally accessible to the public: "It has never been our intent to deny anyone from using the sidewalks or streets for their intended purpose." (July 31, 2000, Tr., p. 183); "[T]he streets, even through they've been privatized, are treated as public streets for their intended purposes." (July 31 Tr., pp. 197); "[T]hat was not the intended purpose to close the streets for other legitimate traffic." (July 31 Tr., pp. 230-31). According to Mr. Curtis, the RRHA property remains open to joggers, drive-through traffic, pedestrian "walk-through" traffic, and all public use and travel. (July 31 Tr., pp. 192, 197, 208. 230-231). Mr. Curtis also testified that, aside from the posted "no trespass" signs, no changes have been made in the appearance of the streets, and the public has continued to use the streets and sidewalks as public thoroughfares. (July 31 Tr., p. 268). RRHA officials Solomon Akinwande, acting director of housing operations and the director of housing management for RRHA, and Gloria Rogers, the on-site manager at Whitcomb Court, similarly testified that the property could be used as a public thoroughfare (July 26 Tr., p. 162; July 31 Tr., p.16).

When asked to explain the No Trespass policy in light of the broad public access, Mr. Curtis stated: "[A]nyone who is...on RRHA property, including a street that has been privatized, anyone who is not visiting someone in the community or conducting legitimate or legal or social activities in the community, is not welcome on the property." (July 31 Tr., p. 176). At points in his testimony, Mr. Curtis defined "legitimate" to mean "legal." (July 31 Tr., p. 179). He defined "unauthorized" as "persons who are committing illegal acts on the property or suspicion." (July 31 Tr., p. 272). At other points, he described trespassing as "malingering or loitering without any purpose." (July 26 Tr., p. 165). Mr. Akinwande explained that RPD officers were not issued written guidelines concerning the definitions of "unauthorized persons" or "legitimate business" because "I [Solomon Akinwande] don't think that would be reasonable to give a police officer, because this is a democratic society." (July 26 Tr., p. 136). In the same spirit, Mr.

on these findings, the appeals court struck down the "no trespass" policy as an unconstitutional infringement of the "'right to move from one place to another according to inclination,'" and right to "remain in a public place of [one's] choice." Pet. App. 40, quoting *Chicago v. Morales,* 527 U.S. 41, 53, 54 (1999). The Virginia Supreme Court affirmed on the grounds that the challenged policy was vague and overbroad in its impact on constitutionally protected First Amendment activity. Pet. App. 59. The state supreme court reached this conclusion without deciding the public forum issue.

SUMMARY OF ARGUMENT

Both the petitioner and the United States acknowledge that if the streets and sidewalks which traverse and partially surround Whitcomb Court are a public forum,

Akinwande stated that he did not believe the RPD had authority to challenge a person's stated reason for being on the property because "I don't think it is the right of the police officer to determine if the person has a right to be there." (July 26 Tr., p. 136). According to Mr. Akinwande, RPD may not stop someone to question them simply because the officers do not recognize the person (July 26 Tr., pp. 154-55), and if the person says "I am visiting someone," the police must let them go. (July 26 Tr., p. 140).

The police witnesses in Green presented a very different picture. Three police officers whose duties are concentrated in different RRHA housing communities, testified that guests must be in the presence of a resident at all times. (July 31 Tr., pp. 332-333; Aug. 1 Tr., p. 61). Officers approach persons they do not recognize as residents and order them to leave the property if they are not in the presence of a resident. (July 31 Tr., pp. 332-333). If a person refuses to answer police questions, they are detained and ultimately arrested if they are not cooperative. (July 31 Tr., p. 333). Uniformly, the officers testified that loitering – "hanging out" – is not permitted. (Aug. 1 Tr. 63; Aug. 17 Tr. 37). Arrests are made without prior warning or banning. (July 31 Tr., pp. 65; Aug. 17 Tr., p. 23). According to Officer Christopher Wade, vehicular drive-through traffic is permitted, but pedestrian walk-through traffic is not permitted. (July 31 Tr., pp. 330-332).

then the ability of Housing Authority officials and City police to enforce rules against loitering and trespass is severely limited. *See City of Chicago v. Morales*, 527 U.S. 41 (1999).[6] We agree with this assessment. Consequently, we also believe that the public forum issue is central to resolving this case. It is the State's burden to demonstrate that the conveyance of title from the City of Richmond to the Richmond Redevelopment and Housing Authority so fundamentally altered the form and function of these public streets that they no longer qualify as a traditional public forum. That burden has manifestly not been met on this record. Moreover, the State's failure to carry its burden of proof is even more glaring when one considers other evidence in the public record describing the nature and use of the streets in Whitcomb Court. *See* n.5, *supra*. We recognize, of course, tht the Virginia Supreme Court found it unnecessary to address the public forum question in its decision. But this Court can affirm that decision on any ground raised and argued below. If the Court finds that the streets at issue here are indistinguishable from the streets in many other residential neighborhoods, *see Frisby v. Schultz*, 487 U.S. 474 (1988), the "no trespass" policy cannot stand. If the Court determines that the record is insufficient to resolve the public forum question (and the decision is not affirmed on other grounds), we respectfully submit that the proper course is to remand for further proceedings on that issue.

The right to travel on the public streets is a basic aspect of the liberty protected by the Due Process Clause. Whether relying on vagueness or overbreadth or substantive First Amendment doctrine, this Court has repeatedly and

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[6] Petitioner's brief at 36 (as sovereign, government generally may not ban persons from public streets and sidewalks); Brief of the United States at 11 ("If the property at issue remains a public forum, then the vesting of discretion and the management of First Amendment issues become serious problems.").

consistently held that government officials cannot be given unfettered discretion to interfere with that right. *City of Chicago v. Morales*, 527 U.S. at 53-54; *Shuttlesworth v. City of Birmingham* 382 U.S. 87 (1965). The fact that legal title has passed to another government entity does not negate the public forum status of municipal streets under circumstances where they continue to function as municipal streets for all intent and purposes. *Hague v. CIO*, 307 U.S. 496, 515-16 (1939). The government cannot overcome that presumption by mere fiat; "it must alter the objective physical character or physical uses of the property, and bear the attended costs." *International Soc'y for Krishna Consciousness, Inc. v. Lee* 505 U.S. 672, 700 (1992) (Kennedy, J., concurring in judgment). No such alteration has occurred here.

This Court's decision in *Frisby* is controlling on the present record. Although the Housing Authority was established to provide safe and affordable housing for low-income residents, communities all across America seek to preserve the quality of life and the residential character of their neighborhoods through the adoption of zoning and other land use restrictions. While property owners can assuredly keep trespassers off their property, they have no right to prevent individuals from passing freely on the local streets and sidewalks. There is no reason to come to a different result in this case.

Finally, we emphasize that even when the government is acting in a proprietary capacity, as when it manages an airport or post office, there are constitutional limits on its discretion. Its regulations must be viewpoint-neutral and they may not unreasonably burden the exercise of constitutional rights. *Perry Educational Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983). Here, the undeniable impact of the challenged policy is to prohibit respondent from visiting his mother and children in their own homes. The Constitution protects these intimate

associations and the government cannot – as it has here – arbitrarily interfere with those interests. When he was arrested, respondent was not loitering or engaging in any other purported illegal activity. So far as the record discloses, he was carrying diapers on his way to see his child. The Housing Authority's position is that like any landlord it is free to exclude all guests for any and no reason. While this probably exceeds the common law authority of even private landlords, we submit that a policy that vests such unfettered discretion in Housing Authority officials is unreasonable on its face, and unconstitutionally interfered in this case with respondent's right to visit his immediate family.

ARGUMENT

I. THE STREETS AND SIDEWALKS RUNNING THROUGH AND AROUND WHITCOMB COURT ARE TRADITIONAL PUBLIC FORA

A. Whitcomb Court is a Residential Neighborhood Anchored by the Types of Streets and Sidewalks that this Court has Defined as a Public Forum in *Frisby v. Schultz.*

We begin with the proposition that streets and sidewalks have historically been considered to be public forums, with all that connotes for free public access.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. CIO, 307 U.S. at 515-16 .[7]

Whether the government purports to be acting in its sovereign or proprietary capacity, it cannot place the streets of an entire residential neighborhood beyond the reach of the public forum doctrine. *Frisby v. Schultz*, 487 U.S. 474. There are no doubt thousands of subdivisions scattered throughout this country, like those involved in *Frisby* and in this case, whose streets are part of the daily life and transportation grid in those communities. Homes like the ones in *Frisby*'s residential subdivision were conceived, built and purchased as private residences and as havens from our loud and contentious inner cities. The residential character

[7] This Court has repeatedly reaffirmed the *Hague* principle. *See, e.g., United States v. Grace*, 461 U.S. 171, 179 (1983)("sidewalks, of course, are among those areas of public property that traditionally have been held open for expressive activities and are clearly within those areas of public property that maybe considered generally without further inquiry to be public forum property"); *Frisby v. Schultz*, 487 U.S. at 480; (Public streets are the "archetype of traditional public forum"); *Boos v. Barry* 485 U.S. 312, 318 (1988) (same); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968). ("streets....are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely"); *see also Carey v. Brown*, 447 U.S. 455, 460 (1980); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976); *Shuttlesworth v. Birmingham*, 394 U.S. at 147, 152 (1969).

of those streets, however, did not affect the forum analysis. *Id.* at 484.

No less is true in this case. While the residents of Whitcomb Court also seek haven from the blight of the city, the streets anchoring their community are like the streets in *Frisby* and communities everywhere. It seems incongruous to decide that these particular streets in Whitcomb Court are not a public forum simply because they involve a low-income residential neighborhood rather than the suburban neighborhood at issue in *Frisby*. After all, it is not as if the public forum doctrine originated in suburban America. Indeed, one of the Court's earliest First Amendment cases involved Federal Housing Authority property established for defense industry workers in a town established and owned by the United States. *See Tucker v. State of Texas,* 326 U.S. 517, 518-19 (1946).

The residential character of a street may affect the government's ability to impose time, place, or manner regulations, but the street nevertheless remains a public forum. Prior to *Frisby*, for instance, the Supreme Court twice upheld the right of demonstrators to picket the streets fronting the private residence of the Mayor of Chicago. *Carey v. Brown*, 447 U.S. 455 (1980); *Gregory v. City of Chicago*, 394 U.S. 111 (1969). In neither case was the residential character of the neighborhoods sufficient to transform the streets at issue from public to non-public forums. In *Frisby*, the Court characterized *Carey*'s description of the public streets and sidewalks in residential neighborhoods as "virtually foreclos[ing] appellant's argument." 487 U.S. at 480. The Court made a similar point in *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640 (1981), when it rejected the respondents' attempt to describe the state fairgrounds at issue in that case as a traditional public forum, like the public streets. "[I]t is clear that there are significant differences

between a street and the fairgrounds. A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment." *Id.* at 651. Justice White's description in *Heffron* of a hypothetical "street" entitled to characterization as a quintessential public forum serves as an accurate description of the Whitcomb Court streets.

A holding that streets located in residential areas are not public forums would have far reaching consequences. Even if limited to government housing developments, it would have a significant impact in most major American cities. For that reason, this Court has held that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz* 487 U.S. at 480-81. That principle is controlling here.

B. The Streets in Whitcomb Court Continue to Have the Objective Attributes of a Public Forum Despite the Housing Authority's Adoption of a No Trespass Policy.

In *United States v. Grace*, the Court held that the sidewalks outside its own building were a public forum.

> Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.

461 U.S. at 179.

That is equally true here. Formalities of title do not control the public forum analysis. *Hague v. CIO*, 307 U.S. at 515 ("wherever the title of streets and parks may rest, they have immemorially been held in trust for use by the public..."); *cf. Marsh v. Alabama,* 326 U.S. 501, 506 (1946) ("ownership does not always mean absolute dominion.") *See also Evans v. Newton,* 382 U.S. 296, 302 (1966) (mere fact of private ownership was not enough to divest the park of its "public character"; the Fourteenth Amendment applied "regardless of who now has title under state law").[8] Simply declaring an entity to be private "does not alter its characteristics so as to make it something more than it actually is." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 393 (1995). The City of Richmond cannot transform public streets and sidewalks into private, non-public property simply by passing an ordinance declaring them "off limits" when they continue to otherwise function the same as they had in all previous respects. As Justice Kennedy has explained , in order to change a property's public forum status the State "must alter the objective physical character or uses of the property." *Lee,* 505 U.S. at 700 (Kennedy, J., concurring)[9]

[8] Indeed, title to streets and sidewalks often rests with the abutting landowner. *Cf. Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission* 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (observing that in the majority of jurisdicitions, title to some of the most traditional of public fora, streets, and sidewalks remain in private hands). *See also* 10 A E. Mc Quillin, Law of Municiple Corporations § 30.32 (3d ed. 1990). 39 AMJUR.2D *Highways, Streets, & Bridges* 182-83 (1999) (citations omitted).

[9] The government's intent has relevance in determining whether it has created a designated public forum. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). By contrast, "traditional public for a open for expressive activity regardless of the government's intent." *Arkansas Educational Television Commission v. Forbes,* 523 U.S. 666, 678 (1998).

Here, there has been no fundamental alteration in "the objective physical characteristics or uses of the property." To the contrary, the streets and sidewalks continue to serve as a pedestrian and vehicle throughway for the members of the community and the surrounding neighborhood. They remain part of the neighborhood transportation grid and are easily accessible to the general public. Their basic configuration and appearance are unchanged. To the extent the streets provide access to RRHA buildings, the former "public streets" did the same. The absence of fences or gates that distinguish gated communities from other residential neighborhoods is also telling. *See Lee*, 505 U.S. at 698-99 (Kennedy, J., concurring in judgment) (whether property shares physical similarities with traditional public forums is one of the most important factors in defining public fora.)

Residents who once freely drove or walked along Bethel or Sussex streets when they were owned by the City continue to do so. So do their guests and the public in general unless they are unfortunate enough to be stopped by a policeman and cannot establish they have legitimate reasons to be in the neighborhood. Moreover, as in other neighborhoods, the streets in Whitcomb Court are not simply conduits. They are places where friends and neighbors gather and where children play. We know from the record that First Amendment activity continues to be allowed largely unregulated – especially by people who are church affiliated and people distributing literature. J.A. 37-38. This is also an important consideration in the Court's cases.[10]

[10] *See e.g. Lee* 505 U.S. at 698-99 (Kennedy, J., concurring) ("If the objective physical characteristics of the property and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.") *Lee* 505 U.S. at 698-99 (Kennedy, J., concurring); *Id.* at 686 (O'Connor, J., concurring) (In assessing the property for First Amendment purposes, the question is whether

The only thing that has changed in function is that people who are targeted for exclusion can be arrested for trespass for the very same conduct that was previously beyond the reach of the law.

The Commonwealth contends that not all walkways are sidewalks and that the sidewalks here are more similar to the walkways at issue in *United States v. Kokinda,* 497 U.S. 720 (1990). Its reliance on *Kokinda* is misplaced. In *Kokinda*, the Court held that the sidewalks leading to a post office were not public fora because they led only from the post office parking lot to the post office building, and their sole purpose was to provide ingress and egress to the post office. *Id.* at 727 (plurality opinion of O'Connor, J.) ("[t]he postal sidewalk at issues does not have the characteristics of public sidewalks" because it is not a "public passageway" or "thoroughfare" but "leads only from the parking area to the front door of the post office....[and] was constructed solely to provide for the passage of individuals engaged in postal business."). Here, however, the purpose of the sidewalks is not limited to ingress and egress to Housing Authority buildings. Rather, they function more generally for pedestrian passage and enjoyment, and are thus indistinguishable from those sidewalks that have been held to be public fora. *See Frisby v. Schultz*

The purported closure of these streets and the adoption of a No Trespass policy is nothing more than a thinly veiled attempt to extinguish the public forum status of the property. The Court should reject this dangerous and far reaching assault on public forum doctrine. "As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and expression can take place." *Kokinda* 497 U.S. at 737

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expressive activity is compatible with the purposes and uses to which the government has lawfully dedicated the property, not whether government has designated speech as the purpose of the property).

(Kennedy, J., concurring in judgment). At the heart of public forum analysis lies the principle that in a free nation citizens must have the right to gather and speak with other citizens in public places. This principle may not be breached by an attempt by government officials to establish and preserve a particular type of residential atmosphere, whether using the pretext of maintaining that atmosphere, as in *Frisby*, or combating crime, as here. *See Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002) (discussing how the threat of burglars is often advanced in the Court's canvassing cases). On these facts, the Housing Authority has no greater right to exercise dominion over these streets than the City of Richmond itself did when title to the streets rested with it.

II. THE RRHA TRESPASS POLICY ARBITRARILY EXCLUDES INDIVIDUALS FROM TRADITIONAL PUBLIC FORA IN VIOLATION OF THE DUE PROCESS CLAUSE

A. The Challenged Policy Violates the Right to Travel Freely On the Public Streets.

Although the Supreme Court has not expressly recognized a fundamental right to move at will on the streets and sidewalks in the city where one resides. Justice Stevens , joined by Justice Souter and Justice Ginsburg, observed:

> [I]t is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent v. Dulles,* 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W.

Blackstone, Commentaries on the Laws of England 130 (1765).

City of Chicago v. Morales, 527 U.S. at 54; *see also Kolender v. Lawson*, 4621 U.S. 352, 358 (1983) (noting that anti-loitering statute, which required individuals to provide "credible and reliable" identification "implicated consideration of the constitutional right to freedom of movement"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (describing walking, loitering, and wandering as "historically part of the amenities of life as we have known them"). Over one hundred years ago, the Court noted "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution." *Williams v. Fears*, 179 U.S. 270, 274 (1900). *See also Civil Rights Cases*, 109 U.S. 3, 39 (1883) (Harlan, J., dissenting) (stating that the right to use public highways is "fundamental in the state of freedom, established in this country. . .") *See also Johnson v. City of Cincinati*, 310 F. 3d. 484, 495-501 (6th Cir. 2002) (canvassing the solid historical foundation for the right to move freely on the city's streets and sidewalks).

The right to move freely on the public streets is implicit in the Court's many cases involving local ordinances targeting loitering in public places. *See Morales, supra; Papachristou, supra.* While these cases typically turn on considerations of vagueness, they recognize the difficulty of crafting an ordinance that attempts to criminalize conduct that involves nothing more than peacefully and unobtrusively using the public streets. The right to move freely is also implicit in the Court's many public forum cases involving situations where the plaintiff or defendant is doing nothing more than standing on a street

corner distributing literature, gathering signatures, or speaking to people who stop to listen, *e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940), and in its cases involving the use of the streets for picketing and protest marches, *e.g. Shuttlesworth v. Birmingham*, 394 U.S. 147. Streets and sidewalks cannot retain their traditional function of "assembly, communicating thoughts between citizens, and discussing public questions," *Hague v. CIO*, 307 U.S. at 515-16, if individuals may be arbitrarily be excluded from them.[11]

The RRHA policy directly abridges this basic right. For those who have been banned, the right to move freely in certain public places has simply been eliminated. In our view, this is sufficient to render the policy facially unconstitutional.[12] As in *Morales*, however, "[t]here is no need . . . to decide whether the impact of the [RRHA policy] on constitutionally protected liberty alone would suffice to support a conviction," because the policy is also void for vagueness.

B. The Policy is Void for Vagueness

The RRHA trespass policy allows police to ban any person from public streets and sidewalks if he cannot demonstrate a "legitimate business or social purpose" without explaining what constitutes "legitimate business." This Court has repeatedly found similar language to be unconstitutionally vague, and it should do so here as well. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of

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[11] This proposition is not contested by the Petitioner or the United States. *See* note 6, *supra*.

[12] In *Johnson v. City of Cincinnati*, the 6th Circuit invalidated an ordinance that prohibited persons convicted of drug crimes from entering certain parts of the city on the grounds that it abridged the constitutionally protected right to travel locally through public spaces and roadways. 310 F.3d. at 494-498.

notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56 (*citing Kolender v. Lawson,* 461 U.S. at 357). The RRHA trespass policy fails on both counts.

This Court has rightly condemned laws that allow police to decide based on their own hunches and biases who should be allowed at large in a public place. Most recently, in *Morales*, the Court invalidated an ordinance that allowed police to order a group in a public place to disperse if the group included a street gang member and the group was "remain[ing] in any one place with no apparent purpose." Failure to obey the dispersal order resulted in arrest. The ordinance was unconstitutionally vague because it failed to "establish minimal guidelines to govern law enforcement." 527 U.S. at 60 (quoting *Kolender v. Lawson,* 461 U.S. at 358). Specifically, the phrase "no apparent purpose" allowed the police to make unconstrained judgments about whether a purpose was "apparent."

The *Morales* holding had ample precedent. In *Papachristou v. City of Jacksonville*, *supra*, the Court invalidated an ordinance that prohibited, among other things, "wandering or strolling around from place to place without any lawful purpose or object." 405 U.S. at 156 n. 1. The Court struck the ordinance down as void for vagueness, both because it "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden ... and because it encourage[d] arbitrary and erratic arrests and convictions." *Id.* at 162 (citations omitted). The "restriction" that the wandering or strolling had to be "without any lawful purpose or object" did nothing to cure the ordinance's inherent vagueness but rather set "a trap for innocent acts." *Id.* at 164.

Similarly, in *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971), the Court considered an ordinance penalizing "any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business...." This ordinance was deemed "vague and lacking ascertainable standards of guilt." *Id.* at 545. *See also Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (ordinance forbidding "any person to stand or loiter upon any street or sidewalk ... after having been requested by any police officer to move on" did "not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (separate opinion of Black, J.); *Thornhill v. Alabama*, 310 U.S. 88, 100 (1940) (in an anti-loitering and anti-picketing statute, the qualification " 'without just cause or legal excuse' does not in any effective manner restrict the breadth of the regulation," because "the words themselves have no ascertainable meaning either inherent or historical").

The present case falls squarely within this line of precedents. Like the ordinances in those cases, the RRHA policy is designed to prevent crime by allowing police simply to get rid of individuals they deem suspicious. To be banned from RRHA streets and sidewalks, a person need not engage in or even threaten misconduct. It is enough that the police do not like the look of him. The "limitation" that only people with "no legitimate business or social purpose" may be banned is meaningless. That phrase is no clearer than "without just cause or legal excuse," "without any visible or lawful business," "without any lawful purpose or object," or "no apparent reason."

The RRHA trespass policy is also defective under this line of authority because it does not provide any meaningful standard to which persons may conform their

conduct. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance prohibiting "three or more persons to assemble ... on any of the sidewalks, street corners ... and there conduct themselves in a manner annoying to persons passing by" held unconstitutionally vague because "it subjects the exercise of the right to assembly to an unascertainable standard"); *Papachristou*, 405 U.S. at 162 (vagrancy ordinance held void for vagueness because "it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'") (citation omitted). A prohibition on being in a public place with "no legitimate business or social purpose" does not allow people of ordinary intelligence to comply with its requirement, because no person can predict which lawful conduct will be perceived as "legitimate" by any particular police officer.

It is true that in some cases, a person is not arrested for criminal trespass until after he has been warned or received a barment letter. This is not the practice in all cases, however; the evidence shows that the police have complete discretion to make arrests. *See* note 5 *supra*. Even so, the trespass policy is analogous to the loitering ordinance in *Morales*. Under that ordinance, a person could not be arrested without first being ordered, and refusing, to leave the area. But, as a plurality of the Court explained, such "notice" did not render the statute constitutional.

> Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit.. . . .If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth*. Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse.

Morales, 527 U.S. at 58-59. The same rule applies here. The police may decide arbitrarily whom they will ban from RRHA property, and there is no advance notice that protects one from being banned. By the time the banning order is issued, it is too late.

Finally, "[t]he most important aspect of the vagueness doctrine is ... the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (internal quotation and citation omitted). Where a criminal statute fails to provide such minimal guidelines, it "may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id. (internal quotation and citation omitted). It furnishes a convenient tool for " 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' " *Papachristou*, 405 U.S. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. at 97-98).

For much the same reasons that the RRHA policy fails to give adequate notice, it also fails to cabin the discretion of law enforcement officers. Since the RRHA policy provides no definition of "legitimate business or social purpose," each particular police officer gets to decide what is "legitimate." "Indeed, because any person standing on the street has a general 'purpose' – even if it is simply to stand – the [policy] permits police officers to choose which purposes are *permissible*." *Morales*, 527 U.S. at 65-66 (O'Connor, J., concurring) (emphasis in original).

The manifest intent of this open-ended discretion is to cast a wide enough net to encompass virtually any non-resident appearing on RRHA property, and then let the

police decide which individuals are unsavory enough to ban. Such a preemptive approach to law enforcement is inconsistent with our justice system's insistence on a presumption of innocence.

III. EVEN WHEN THE HOUSING AUTHORITY ACTS IN ITS PROPRIETARY CAPACITY, ITS TRESPASS POLICY IS UNREASONABLE BECAUSE IT ARBITRARILY PREVENTS HICKS AND OTHERS FROM ENGAGING IN THE FUNDAMENTAL RIGHT OF INTIMATE ASSOCIATION

A. The Constitution Clearly Protects Hicks' Right of Intimate Association from Undue Intrusion by the Housing Authority

The Court has "long recognized that because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). While not identifying precisely the range of relationships protected by the right of intimate association, this Court has, from time to time, noted several "personal affiliations" worthy of constitutional protection. *Id.* at 619. This protected family sphere includes, at a minimum, marriage, *Zablocki v. Rehail*, 434 U.S. 374 (1978); childbirth, *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); the raising and education of children, *Smith v. Oranization of Foster Families*, 431 U.S. 816 (1977); and the choice of living arrangements among relatives, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). As the Court noted in *Roberts*,

> [f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one share not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.... As a general matter, *only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.*

468 U.S. at 620 (emphasis added).

Here, Hicks' constitutionally protected intimate relationships are clearly implicated because Hicks' mother, his baby and his baby's mother all live at Whitcomb Court. When officer Laino issued Hicks a citation for trespassing at Whitcomb Court on January 20, 1999, Hicks was on the Housing Authority's property to bring "Pampers to his baby." His repeated efforts to have his barment lifted and to visit his children without risk of arrest have been rejected without explanation. The impact on respondent's "highly personal relationships," *Roberts*, 468 U.S. at 618, is clear and substantial.

B. The Housing Authority's "No Trespass" Policy Unreasonably Interferes With Intimate Family Associations

In non-public fora, such as airports, courthouses, and other municipal, state, or federal buildings, the government admittedly has broader discretion to regulate asserted constitutional rights. Unlike a private property owner, however, the government's actions are not completely untethered from constitutional limitations. "[E]ven when acting in its proprietary capacity, [the government] does not enjoy absolute freedom from First Amendment constraints."

Kokinda, 497 U.S. at 725; *cf. Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (striking down a regulation prohibiting all First Amendment activities in the Los Angeles International Airport because such a ban cannot be justified by any conceivable government interest). Its regulations must not be based on viewpoint and must be reasonable in light of the purposes of the government forum. *Perry*, 460 U.S. at 45.

In *Lee*, the Court held that an airport terminal was not a public forum. 505 U.S. at 680. Applying the reasonableness standard appropriate for non-public fora, the Court concluded that airport officials could not ban the distribution of literature inside the terminal. Justice O'Connor's concurring opinion summarized the relevant inquiry for determining the reasonableness of a restriction:

> The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Cornelius, supra,* 473 U.S. at 809, 105 S.Ct., at 3453. "'[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.'" *Kokinda, supra,* 497 U.S. at 732, 110 S.Ct., at 3122, quoting *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-651, 101 S.Ct. 2559, 2566, 69 L.Ed.2d 298 (1981).

Lee, 505 U.S. at 687.

Here, too, the reasonableness of the government's actions in this case cannot be considered in a vacuum but

must be assessed "in light of . . . all the surrounding circumstances." The State has never asserted a significant interest in barring respondent from visiting his children.[13] Nor has it ever articulated why respondent's past conduct justifies a potential lifetime ban from Whitcomb Court. Indeed, the State apparently regarded respondent's past conduct as so irrelevant to the issues before the Court that it did not bother to explain the reason that respondent had been banned from the premises. That cavalier attitude is revealing. In petitioner's view, the State need not explain why respondent was barred from visiting his family because, in its view, the government acting as landlord can exclude respondent from its property for any reason or no reason. J.A. 13.

Even at common law, "the landlord may not prevent invitees or licensees of the tenant from entering the tenant's premises by passing through the common area. Moreover, the law is clear that an invitee or licensee who does so, even after a specific prohibition by the landlord, is not a trespasser and does not violate a criminal trespass statute." *State v. Dixon*, 725 A.2d 920, 922 (Vt. 1999); *see also Gordon County Broad. Co. v. Chitwood*, 87 S.E.2d 78, 79 (Ga. 1955); *Konick v. Champneys*, 183 P. 75, 77 (Wash. 1919); *Central Bus. Coll. Co. v. Rutherford*, 107 P. 279, 280-81 (Colo. 1910); *Arbee v. Collins*, 463 S.E.2d 922, 925 (Ga. Ct. App. 1995); *State v. Schaffel*, 229 A.2d 552, 562 (Conn. Cir. Ct. 1966). When the state interferes with a father's right to visit his children, it surely must show more than the state has shown on this record.

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[13] While the challenged policy on its face does not and could not prevent all family visits, it allows RRHA officials to target individuals who they do no want on the premises and prevent them from visiting with family and friends. Because of the "no trespass" policy in force at Whitcomb Court, respondent has been sentenced to jail for doing nothing more than visiting his family.

This is not a domestic abuse case where a protective order has issued. Nor does it involve any allegation of drug dealing, weapons charges or other violence. So far as the record reveals, Hicks is guilty of nothing more than being stopped and questioned repeatedly by the police and then arrested and convicted for being present in the neighborhood where his mother and children live. As the RRHA's own policy allowing guests evidences, government landlords have no greater power to interfere with tenant's lawful guests than private landlords. Even if the common law rule is not controlling, RRHA must act reasonably in light of the purposes for which it was established and the asserted interests at stake. *Lee,* 505 U.S. at 687-88. Whitcomb Court is a residential neighborhood that provides housing for hundreds of families. It is laid out on the city grid and seamlessly incorporated into the surrounding neighborhood. The comings and goings of friends and other guests – especially family members – is fundamentally consistent with the RRHA's purpose and mission. While RRHA officials could certainly limit access to uninvited guests, the justification for excluding invited guests is not compatible – rather, it is patently *incompatible* –with the purposes of public housing. *Id.*

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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